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No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS, MELBA L. PARSONS; and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below correctly affirm a district court injunction staying proceedings in a state court action in the following circumstances:

The district court found that an action there under the Bank Holding Company Act (12 USC § 1972) and a state court action were based on the same factual allegations and substantially the same damages claim. After a federal judgment in favor of respondent bank, petitioners sought to relitigate substantially identical matters in the state action. Because the state judgment in effect nullified the earlier federal one, the district court, pursuant to 28 USC § 2283, enjoined further prosecution of the state court action in order to protect and effectuate its prior judgment.

2. Did the court below correctly affirm the district court's inclusion in the scope of this injunction of a state court party—by choice not a party to the federal action—upon a factual finding of privity and adequate representation?

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No. 84-1616

IN THE

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VS.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 (11th Cir. 1984). It appears as Appendix A to the petition.

JURISDICTION

Although the petition does not contain all relevant dates, Respondents understand that the petition was filed on April 12,

1984 within 90 days of January 14, 1985 the date of the denial of the petition for rehearing below. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of 28 U.S.C. § 2283 are contained in the petition. The relevant portion of Rule 52(a) F.R.C.P. is also involved.[1] Although the petition asserts that the due process clause of the Fifth Amendment of the United States Constitution is involved, this issue was not presented below.

STATEMENT OF THE CASE

Respondent refers to the majority opinion of the court of appeals below which appears in petitioners' appendix and which is reported at 747 F.2d 1367.

Moreover, that opinion shows as does the opinion of the district court of March 29, 1985, Appendix A to this brief, that the court of appeals remanded, as to the petitioner trustee, to permit the district court to determine whether its injunction "should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale."[2] Upon remandment the district court, after having given the trustee an opportunity to submit facts, held that its injunction should not be modified "to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court, and the Trustee was privy to such litigation." (A-10)

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[1] "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...."

[2] 747 F.2d 1381; A-26 of petition.

The petition states (p. 3) that the earlier federal action "alleged only" that Bank had placed an impermissible condition on a further extension of credit in violation of the Bank Holding Company Act (BHCA) 12 U.S.C. § 1972. This statement is erroneous and is negated by the extensive factual recitations of the court of appeals and the district court. The district court, for example, held that "an identical set of facts to those previously tried in this Court" was tried in the later state court proceedings;[3] and the court of appeals approved these findings.[4] Even the dissenting judge below agreed with the district court and the majority "that the state court litigation repeated the federal court issues—or issues that could have been resolved there."[5]

Petitioners mislead when they assert that respondents did not seek to join trustee as a party to the earlier federal action. (p. 4) The court of appeals and the district court found that the trustee "chose not to participate in the [earlier federal] suit;"[6] and

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[3] A-42 of petition.

[4] 747 F.2d at 1370; A-5 of petition.

"In a well reasoned opinion the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have, and should have been raised in federal court under the doctrine of pendent jurisdiction. The BHCA action was therefore res judicata as to the state action. Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment." (Footnote omitted.)

[5] 747 F.2d at 1382; A-30 of petition.

[6] 747 F.2d at 1370; A-3 of petition.

noted that his decision was because of his view that the federal and state actions "based on the Bank's presale activities [were] frivolous."[7]

In a remarkable error, petitioners assert (p.5) that the district court "made no finding that the injunction was necessary to 'protect or effectuate' its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action." This statement is wholly inaccurate and recurs (e.g. pp. 16 and 18). The district court issued its injunction "to bar further relitigation of proceedings already decided in this Court"; and noted the public interest "in deterring relitigation of suits."[8] Moreover, as already noted, the court of appeals held that the district court issued its injunction "to protect or effectuate its prior judgment," because the state court judgment "nullified" the earlier federal court judgment.[9]

Exacerbating this inaccuracy, petitioners argue (p.5, n.2) that the court of appeals majority, in a unique decision, held that § 2283 was an exception to the full faith and credit act. The actual holding below was that, although § 2283 generally prohibited injunctions to stay proceedings in a state court, Congress had conferred that power on federal courts—as an exception to this prohibition—when it enacted the relitigation exception in 1948; and "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action."[10]

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[7] 747 F.2d at 1378; A-20 of petition.

[8] A-42 of petition.

[9] *Supra*, n. 4

[10] 747 F.2d at 1376; A-16 of petition.

REASONS FOR DENYING THE WRIT

1. Petitioners have filed a joint petition; a portion of the decision below which the trustee seeks to review was remanded by the court below; and the district court has conducted further proceedings and entered a subsequent order on March 29, 1985. In these circumstances, after a remand, this Court has denied certiorari because "the case is not yet ripe for review." *Brotherhood v. Bangor and Aroostook R. Co.*, 389 U.S. 327, 328 and authority cited.

2. Petitioners have failed to present any "special or important reasons" for the grant of certiorari and have failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with a decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with applicable decisions of this Court.

The courts below have applied the relitigation exception of § 2283 in a classic context—to effectuate the earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to the victor in the earlier federal litigation the fruits of that victory. This is precisely why congress enacted this exception to § 2283 in 1948, namely, to assure by express legislative language, that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate" their judgments. As the code reviser has noted, Congress intended to adopt, by this legislation, the position of the "vigorous dissenting opinion" in *Toucey v. New York Life*, 314 U.S. 118, 144.[11]

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[11] So characterized by Congress which adopted it when it reversed the majority by the enactment of § 2283. See Reviser's Notes. The majority opinion was thus characterized by the "vigorous" dissenting opinion (314 U.S. at 144):

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the produc-

Petitioners erroneously assert that when federal courts determine whether an injunction against state proceedings is necessary to "protect or effectuate their judgment," they impermissibly review state court judgments and thus impinge on the exclusive power of this Court. This argument is wholly without merit. Courts and commentators have often described the process Congress had in mind to safeguard the effect of federal court judgments.

> "The Revisor's Note makes clear that this language allows a federal court to enjoin a state court's attempt to relitigate a federal decision, and the lower federal courts have so interpreted it. This is a sensible solution to the problem of relitigation of federal decisions; it prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review. Although a strict interpretation of the anti-injunction statute appeared proper to the Court in *Toucey,* that decision left federal judgments open to state court reversals. Since appeal of right no longer exists from a state court's failure to give res judicata effect to a federal decision, and since the Supreme Court's decisions to grant writs of certiorari are based more upon considerations of general public interest than of the interests of the individual litigants, interlocutory review of state court action by in-

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tion of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field."

junction seems a satisfactory mode of protecting federal judgments."[12]

This Court has expressly recognized that Congress, when it enacted the "relitigation exception" to § 2283, had legislated so as to permit "a federal court to enjoin relitigation in a state court of issues already decided in federal litigation." *Mitchum v. Foster,* 407 U.S. 225, 235. See also this Court's discussion in *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 et seq.

Moreover, the decisions below do not contravene *A.C.L.R.Co. v. Brotherhood,* 398 U.S. 281, as petitioners erroneously suggest. This Court has repeatedly made plain that this case simply holds that federal courts do not have *inherent* power to enjoin state proceedings but must abide by the *express* exceptions to § 2283.[13] The injunction at bar was premised upon the specific relitigation exception in § 2283, and not upon any asserted inherent power of the federal court.

A long line of federal decisions accord with the decision below.[14]

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[12] Note, *Federal Power to Enjoin State Court Proceedings,* 74 Harv. L. Rev. 726, 734, cited in *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F.2d 1286, 1312-1313 (5th Cir. 1971).

[13] See discussion in *Mitchum v. Foster, supra.* and *Vendo Co. v. Lektro-Vend Corp., supra.*

[14] *United States v. District of Columbia,* 654 F.2d 802 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1082; *United States v. Amer. Society of Composers etc.,* 442 F.2d 601 (2nd Cir. 1971); *Allied Mutual Ins. Co. v. Roberson,* 306 F.2d 130 (4th Cir. 1962); *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981), *cert. denied* 456 U.S. 756; *Meridian Investing Development Corp. v. Suncoast Highland Corp.,* 628 F.2d 370 (5th Cir. 1980; *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980); *Seaboard System R. Co. v. Union Camp Corp.,* 613 F.2d 604 (5th Cir. 1980), *cert. denied* 449 U.S. 835;

Petitioners cite many cases (pp. 11-15) which discuss the preclusive effect in federal courts of earlier state court decisions. The short answer is that these cases—as the questions presented by petitioners for review—are simply irrelevant to the issue in this case, namely, the authority of a federal court, under § 2283, to enjoin state proceedings in order to protect and effectuate a prior federal judgment. This Court has characterized one of petitioners' cases, *Brown v. Felsen,* 442 U.S. 127, 138, as "finding congressional intent that state judgments would not have claim preclusive effect on dischargeability issue in bankruptcy."[13]

The *reductio ad absurdum* of petitioners' argument is that a federal court would be powerless, despite § 2283, to stay any state proceeding which nullified its prior judgment *unless* a federal injunction issued whenever there was a possibility that a state court might rule on the preclusive effect of an earlier federal judgment, and before the state court had an opportunity to do so. Such an absurd process would exacerbate, and certainly not relieve, friction between state and federal courts; and it would thwart the carefully defined congressional purpose of the 1948 revision of § 2283.

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977), *cert. denied* 434 U.S. 832; *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975), *cert. denied* 423 U.S. 908; *Donelon v. New Orleans Terminal Co.,* 474 F.2d 1108 (5th Cir. 1973), *cert. denied* 414 U.S. 855; *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied* 404 U.S. 1047; *Silcox v. United Trucking Service,* 687 F.2d 848 (6th Cir. 1982); *Harper Plastics v. Amoco Chemicals Corp.,* 657 F.2d 939 (7th Cir. 1981); *Wood v. Santa Barbara Chamber of Commerce,* 705 F.2d 1515 (9th Cir. 1983) *cert. denied,* 104 S. Ct. 1446; *Brown v. McCormick,* 608 F.2d 410 (10th Cir. 1979).

[13] *Marrese v. American Academy of Orthopaedic Surgeons,* ____ U.S. ____, 53 U.S.L.W. 4265, 4268 (1985). This case holds that a federal court should not give greater claim preclusion effect to an earlier state judgment on the merits than the state itself would have given.

3. Although the petition impermissibly seeks to raise for the first time a due process argument based on alleged unauthorized representation of the trustee in the federal action,[16] the argument itself has no merit. The court below, as the district court, held that as to facts relating to BHCA and fraud claims, "the Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters."[17] See *Montana v. United States,* 440 U.S. 147. The court below remanded to give the trustee an opportunity to convince the district court that his UCC claim was not based on the same alleged improprieties; and the trustee was unable to do so.[18] Indeed, a case cited by petitioners in an attempted demonstration of circuit conflict, *General Foods v. Mass. Dept. of Health,* 648 F.2d 784, 787 (1st Cir. 1981), holds that due process permits a non party to be bound by a judgment if "he had directly or vicariously a full and fair opportunity to present evidence and argument." All of them (pp. 21-22) hold questions of privity and adequate representation to be fact issues.

4. It is noteworthy that respondents did not bring the federal case but Bank was sued there by the Parsons petitioners and trustee deliberately chose to stay away. Dissatisfied with federal results, petitioners then attempted to relitigate in state court what was or could have been litigated in the federal action. The courts below correctly refused to countenance such tactics; enjoined further state proceedings; and thus furthered the congressional purpose of § 2283.

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[16] Issues never adequately alleged and considered below are not before this Court. *Tennessee v. Dunlap,* 426 U.S. 312, 314, n. 2; *Capital Cities Cables v. Crisp,* 467 U.S. ____, 81 L.Ed.2d 580, 588; and *California v. Taylor,* 353 U.S. 553, 557, n. 2.

[17] 747 F.2d at 1380; A-24-25 of petition.

[18] District court order of March 29, 1985, Appendix A.

CONCLUSION

Accordingly, Petitioners have failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that their petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondents in Opposition upon counsel of record for Petitioners by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

Mr. Frank Wilson
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This 1st day of May, 1985.

M. Roland Nachman, Jr.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

ORDER

(Filed March 29, 1985)

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the injunction heretofore issued by this Court in this cause should not be modified to allow the Trustee to pursue his UCC claim.

DONE this 29th day of March, 1985.

/s/ R. E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83V-181-N

First Alabama Bank of Montgomery, N.A., et al.,
Plaintiffs,

vs.

Parsons Steel, Inc., et al.,
Defendants.

OPINION

(Filed March 29, 1985)

The history of this case is well stated by the Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, [Parsons I], and in *First Alabama Bank v. Parsons Steel, Inc.,* 747 F.2d 1367 (11th Cir. 1984) [Parsons II]. The Court of Appeals in Parsons II remanded with instructions that this Court make fact-findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale. That Court pointed out in guidance:

> "Assuming that the Trustee's UCC claim is based on factual allegations different from those underlying the fraud and BHCA claims, the parties' interests were not so closely aligned as to say the Parsons virtually represented the Trustee as to this narrow claim that the Parsons did not raise in the federal action."

In response to the remand for clarification of the commercial unreasonableness claim, this Court ordered the Trustee to specifically set out said claim. That claim will be considered and compared to the Parsons I claim hereinafter.

The Court of Appeals stated in Parsons II that, almost a year after this Court's judgment [referring to Parsons I] in the

Bank's favor, "the Trustee amended his [State] complaint to include the UCC claim that the foreclosure sale was commercially unreasonable. Until that point in the litigation, the state action against the Bank was based on factual allegations which had been fully adjudicated in the BHCA action. With the addition of the UCC claim, however, the state action began to involve fact questions which the district court found were part of the federal complaint, but which were not reached in the federal litigation" [Parsons II, at 1379-1380]. The Court of Appeals held that the record on appeal was insufficient, however, to determine whether the UCC claim is based on the same factual allegations as was the fraud and the BHCA claims. As noted by the Court of Appeals [Parsons II, at p. 1379], the UCC claim in Parson II is based on commercial unreasonableness. Paragraph 27 of the complaint in Parsons I federal case concerned commercial unreasonableness.[1] This Court found against the Plaintiff on all aspects. Responsibility is on appellant to have a record showing the error. Nonetheless, the Appellate Court, in its remand, states the following:

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[1] Said Paragraph 27 of the Parsons I complaint contained this allegation: "The sale *** was not handled in a commercially reasonable manner ***." The pleaded reasons therefor related to the same facts from which the BHCA violation and the fraud allegations allegedly arose as stated in the complaint. Loose pleading requirements allowed Plaintiffs to state in a one-count or one-claim complaint allegations of a BHCA violation [Paragraph 34], a conspiracy [Paragraphs 25 and 29], a trust violation [Paragraph 26], a commercially unreasonable sale [Paragraph 27], lack of good faith, CODE OF ALABAMA [1975], § 7-1-201, and fraud [Paragraph 30]. It is difficult for this Court to understand the conclusion in the dissent, Parsons II, at p. 1382, as follows: "[A]s the majority correctly notes, the commercial reasonableness claims - the factual basis for which is unclear on the present record - were not pleaded at all in the federal action." The Trustee's attorney had access to these pleadings and participated in discovery. He was clearly privy to the commercial reasonableness claims. If they were treated as damages, he had every opportunity to have prayed that they be treated as a separate cause of action.

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court." Parsons II, supra, at 1380.

CURRENT UCC CLAIM. Whether or not the UCC claim alleges only that "improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets" can best be determined by examining the Trustee's Claims filed herein February 21, 1985, in response to this Court's Order entered February 6, 1985, directing that the Trustee state with particularity his UCC claims.

CURRENT CLAIMS OF TRUSTEE. Guided by the Order of the Court of Appeals that res judicata would bar no part of the Trustee's UCC claims "separate and apart from any of the events leading up to the sale" [Parsons II, supra, at p. 1380], the Trustee's attorney sought to direct his claims to some impropriety occurring after the sale, complaining of a "commercially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc. *** after a foreclosure in January of 1979," in violation of CODE OF ALABAMA [1975], §§ 7-9-504, 7-9-507 and 7-1-201. Sections 7-9-504 and 7-9-507 deal with a commercially unreasonable sale, and Section 7-1-201 deals with the duty of good faith.[2]

More specifically, the Trustee contends in his response to this Court's Order directing specificity the following: (1) that the sale was a private sale of the securities two days after repossession; (2) that only one potential buyer was notified of the sale; (3) that the buyer had no pre-sale experience in the steel business; (4) that no contact was made with any person in the

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[2] It is noted that Paragraphs 27 and 30 of the complaint in Parsons I contained allegations of a commercially-unreasonable sale and a lack of good faith, respectively.

steel business or with any unsecured creditor; (5) that no notice was given the attorney for Parsons Steel Industries, Inc.; (6) that no notice was placed in any steel interests or public publications; (7) that no one except seller and purchaser were in attendance at the sale; (8) that the sale was at a private place; (9) that only one bid was offered and accepted; (10) that the price paid at the sale was determined in accordance with the amount necessary to satisfy the Bank's secured debt; and, finally, (11) that the sales price was $907,252.85 while the value of the collateral was in excess of $2,500,000.00.

It appears to this Court and this Court finds that each of these items of the current contentions of the Trustee was part of the original claims made in this Court and litigated in the suit by Parsons Steel, Inc., and affirmed by the Court of Appeals in Parsons I, supra.

In Paragraph 14 of the complaint [Parsons I], Plaintiffs alleged that on November 30, 1978, a balance sheet of Parsons Steel Industries, Inc., showed assets of $2,384,945.89 and liabilities of $1,910,747.09. Plaintiffs alleged in Paragraph 16 of the complaint that conditions were substantially the same on January 17, 1979. Paragraph 24 of the complaint contained allegations that on January 17, 1979, a private sale of the assets of Parsons Steel Industries, Inc., was held at 10:00 a.m., rather than at the announced time of 2:00 p.m., to OSI, Inc., for $907,252.85. Paragraph 25 of the complaint contained allegations that the agent of the Bank and Mr. Orange for OSI, Inc., worked in concert so as to obtain properties of Parsons Steel Industries, Inc., for Orange. Paragraph 26 of the complaint contained allegations suggesting a violation of a resulting trust. Paragraph 27 of the complaint contained allegations that the sale was "not handled in a commercially-reasonable manner in that the acquisition and sale were completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets purported to be sold;" that no additional possible purchasers were given any opportunity to in-

spect the properties and submit bids; that the sale was not handled in conformity with reasonable commercial practices; and that the assets sold for other than the fair market value thereof. Paragraph 29 of the complaint contained allegations that the Bank, Orange and others were guilty of "collusion *** to do great damage and economic harm to the Plaintiffs and which effectively put ***" Parsons Steel Industries, Inc., out of business. Paragraph 30 of the complaint contained allegations of lack of good faith and fraud with intent to deceive and injure the Plaintiffs and the creditors of Parsons Steel Industries, Inc. Paragraph 32 of the complaint contained allegations of the January 17, 1979, private sale to OSI, Inc., a newly formed corporation, resulting in Plaintiffs' loss of an on-going business together with its assets, leaving unsecured debtors owed $847,000.00. Paragraph 34 of the complaint contained allegations of a violation of the Bank Holding Company Act. Paragraph 37 of the complaint contained allegations that Parsons Steel Industries, Inc., had been placed in involuntary bankruptcy. The trustee in Bankruptcy and his attorney participated in discovery proceedings in Parsons I and, obviously, had access to the complaint which contained the above allegations when he elected not to pursue any remedy on the Trustee's part or on behalf of the creditors.

Another indication that the State claims relate to alleged pre-sale activity can best be determined by the way that the Trustee's attorney processed them in the State court proceeding. In his opening statement, Mr. Wood adopted Mr. Beasley's statement, saying specifically the unsecured creditors "*** had no notice of any foreclosure sale" and that "the Bank obtained from Michael Orange enough to satisfy the Bank's debt but not any more ***." [R. 61-62]. In his closing argument, Mr. Wood stated, "We are entitled to recover on commercial reasonableness—on fraud and conspiracy." [R. 1573]. Mr. Wood, further referring to the pre-sale failure to obtain purchasers and to determine the value of inventory, said that the

Bank "didn't try to find out. Just figured out what the Bank was owed. Same answers on all the other assets of Parsons Steel." [R. 1573]. Mr. Wood stated that "*** Parsons Steel Montgomery is entitled to recover *** on the commercial reasonableness *** of the sale ***. It was *all pre-arranged.* *** It was done in hidden fashion. *** You've got a corporation that was formed especially for it" (emphasis added). [R. 1575]. Mr. Wood spoke of the Bank's wanting to avoid a Chapter 11 proceeding because it would have been more difficult. He spoke of the fact that the time of the sale was changed from "ten to two" because they did not want anyone else there because they "*** were going to sell to Michael Orange," that "they made that decision way back on the tenth or eleventh". [R. 1576]. Referring to the same pre-sale activity, Mr. Wood stated: "Some how, some way in December, they decided to do it differently." [R. 1578].

Trustee's attorney at the State trial complained (1) of plans made before the sale, (2) of fraudulent plans before the sale, (3) of insufficient notice before the sale, (4) of changing before the sale of the time of the sale, (5) of plans to sell to Orange made before the sale, (6) of plans to sell for the amount owed the Bank before the sale, (7) of avoidance of a Chapter 11 proceeding before the sale, (8) of failure before the sale to determine what the inventory was worth, (9) of failure before the sale to determine what other assets were worth and, finally, (10) of the "pre-arranged" lack of "commercial reasonableness of the sale".

Every word of the Trustee's attorney's statements during the State Court trial was devoted to pre-sale activities of Michael Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale. The only substantial change in the Trustee's position is that the Trustee's attorney, guided now by the admonition of the Court of Appeals, alleged, as a preamble to allegations of pre-sale activities, that the Bank "conducted a commer-

cially unreasonable sale and wrongful disposition of the assets of Parsons Steel Industries, Inc., ***" after a foreclosure in January, 1979.

The Court of Appeals stated that, because the questions of liability and damages were bifurcated, evidence of an insufficient price as bearing on commercial reasonableness was never presented to the jury in the federal court trial. The parties to that proceeding and the Trustee had access to the pleadings and participated in a number of the discovery proceedings. They understood that commercial reasonableness of the sale was an issue in the case, whether as damages for the Bank Holding Company Act violation or as an independent claim as now asserted, and the Trustee had every opportunity to litigate commercial reasonableness either as a part of the Bank Holding Company Act or as a part of an independent claim for commercial reasonableness at his option. If the alleged value of the assets as compared to the sales price were not litigated in the trial proceeding in this Court, it was because the parties did not present it to this Court as an issue independent of the Bank Holding Company Act violation. The Trustee knowingly declined to participate. His failure to do so, whether by design (so as to obtain two bites at the apple) or by inadvertence, bars his doing so now under the doctrine of res judicata.

The Trustee's contention that the sales price was unreasonable derives from Plaintiff's claim in Parsons I that the whole thing was planned prior to the sale and that the Bank's agent and Michael Orange, the purchaser, knew and arranged prior to the sale that the sales price would be the amount of the debt to the Bank. Note 11 of the Opinion of the Court of Appeals in Parsons II, supra, at 1373-1374, reads as follows:

> "The record in this appeal does not indicate what precise facts the UCC claim is based on. That is, it is unclear whether the claim is based on allegations that something about the handling of the actual sale was commercially

> unreasonable and resulted in an insufficient price or whether the UCC claim is based solely on allegations that improprieties involving the Bank and Orange prior to the sale resulted in an unfairly low price."

This Court concludes that the Court of Appeals' Opinion means that, if nothing wrongful happened at the time of the actual sale and the improprieties complained of involved allegations of wrongs by the Bank and Orange prior to the sale resulting in an unfairly low price, then Parsons and all those associated with him, including the Trustee, are barred from further pursuit of this proceeding. Clearly, in the mind of the Court the things that the Trustee still argues were wrongful occurred prior to the sale. While the Trustee insists that the sale itself was unreasonable and the disposition of the proceeds was wrong, he alleges no non-conclusory facts which would indicate that any wrong that was done at or after the sale was improper. His claims of impropriety relate to plans made by Herbert and Orange: failure to give public notice of the sale, failure to seek buyers for the sale, failure to hold the sale at the time previously planned and failure to learn the value of the property securing the debt - in short, failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding.

This Court has been troubled by factors raised in the dissent in Parsons II beginning at 747 F.2d 1367. The dissenter takes the position that, while the original federal adjudication of this proceeding might have initially provided a res judicata bar to the Sate court proceeding, the determination by the State court that the federal court proceeding was not res judicata of the issues in the State court constituted a res judicata bar to the federal court's considering the matter. The Bank, realizing that the pleadings were not specific and initially having its own

doubts that all of the issues in the State court proceeding were barred by the doctrine of res judicata, found it necessary to proceed in the State court proceeding in order to determine that the issues in the State court proceeding were the same as that already concluded by this Court's judgment. That being true, the doctrine of res judicata could only be applied at such time as the issues in the State court proceeding were clearly identified and could be compared to the issues in Parsons I.

The dissenter argues that the Bank should have sought an injunction before the trial in the State court. In cases such as this where issues are not clear in either court, a special hearing would be required to determine precisely what the issues were in each proceeding. On occasion (and probably in this case) this could not have been fully determined until the trial on the issues. If this Court is to protect its jurisdiction, it must have the authority to do so at the point where invasion of jurisdiction becomes apparent. Piecemeal decisions thereon would be of little value.

This Court is of the opinion that the res judicata issue cannot be determined in some cases until the trial on the merits and that the Defendants in this case, by submitting to a trial on the merits including the plea of res judicata in the State case, cannot be held to a waiver of their rights to submit the res judicata issue to the court first having jurisdiction because the issue of waiver concerns itself with private rights as distinguished from public rights and the doctrine of res judicata has as its purpose the avoidance to the public, as well as the parties, of expenses of unnecessary litigation and the conservancy of judicial efforts. This Court is convinced that no private individual should be allowed in effect to waive the effect thereof.

This Court, therefore, finds that the injunction heretofore issued by this Court should not be modified to allow the Trustee to pursue his UCC claim because that claim is based on matters heretofore litigated by this Court and the Trustee was privy to such litigation.

An Order will be enacted in accordance with this Opinion.

DONE this 29th day of March, 1985.

/s/ R. E. Varner
United States District Judge